

11-2332-cv
Southern New England Telephone Company v. Comcast

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2012

(Argued: September 12, 2012

Decided: May 1, 2013)

Docket No. 11-2332-cv

SOUTHERN NEW ENGLAND TELEPHONE COMPANY D/B/A AT&T, CONNECTICUT,

Plaintiff-Appellant,

v.

COMCAST PHONE OF CONNECTICUT, INC., CABLEVISION LIGHTPATH-CONNECTICUT, INC.,
COX CONNECTICUT TELECOM, LLC,

Intervenors-Defendants-Appellees,

METROPCS NEW YORK, LLC, SPRINT COMMUNICATIONS, L.P., SPRINT SPECTRUM, L.P., NEXTEL
COMMUNICATIONS OF THE MID-ATLANTIC, INC., AND YOUGHIOGHENY COMMUNICATIONS
NORTHEAST, LLC D/B/A POCKET COMMUNICATIONS,

Intervenors-Defendants-Appellees, and

ANTHONY J. PALERMINO, COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC UTILITY
CONTROL, KEVIN M. DELGOBBO, COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC
UTILITY CONTROL, JOHN W. BETOSKI, III, COMMISSIONER, CONNECTICUT DEPARTMENT OF
PUBLIC UTILITY CONTROL,

Defendants-Appellees.

Before: POOLER, B.D. PARKER AND WESLEY, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the District of Connecticut (Eginton, J.). We affirm the district court’s determination that Appellant is obligated to provide Appellees with transit traffic service under the Telecommunications Act of 1996 at regulated rates. We further affirm the district court’s reversal of an order requiring Appellant to apply regulated rates to all of its contracts for the provision of transit traffic service.

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2 **AFFIRMED.**
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5 Timothy P. Jensen, Hinckley, Allen & Snyder LLP,
6 Hartford, CT; Theodore A. Livingston, Dennis G.
7 Friedman, J. Tyson Covey, Mayer Brown LLP,
8 Chicago, IL, *for Petitioner-Appellant*,

9
10 Clare Kindall, Assistant Attorney General, New
11 Britain, CT, *for Defendants-Appellees*.
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14
15 BARRINGTON D. PARKER, *Circuit Judge*:
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17
18 **INTRODUCTION**
19

20
21 This appeal requires us to determine whether the Telecommunications Act of 1996
22 (“TCA”), Pub. L. No. 104-104, 110 Stat. 56 (codified in part at 47 U.S.C. §§ 251-261), obligates
23 former telecommunications monopolists, known as Incumbent Local Exchange Carriers
24 (“ILECs”), to provide a connection service known as transit traffic service (“transit service”) at
25 negotiated rates or at lower regulated rates to new entrants seeking to exchange traffic with each
26 other through the ILEC’s facilities. We agree with the United States District Court for the
27 District of Connecticut (Edginton, *J.*) that the regulated rates apply.

28 The TCA transformed the “longstanding regime of state-sanctioned monopolies” into a
29 competitive market. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Prior to its
30 passage, ILECs held state-granted franchises to act as exclusive telephone service providers and,
31 after its passage, they continue to control the physical network infrastructure in most states. *See*
32 *id.*; 47 U.S.C. § 251(h)(1). Plaintiff-Appellant Southern New England Telephone Company, d/b/a
33 AT&T Connecticut (“AT&T”), is an ILEC in Connecticut.

1 New entrants, known as Competitive Local Exchange Carriers (“CLECs”), entered the
2 market after deregulation. They now compete with ILECs to provide services, but they lack some
3 of the advantages that the ILECs enjoy due to the ILECs’ historical ownership of network
4 infrastructure. Intervenor-Defendants-Appellees Comcast Phone of Connecticut, Inc.,
5 Cablevision Lightpath-Connecticut, Inc., and Cox Connecticut Telecom, LLC are CLECs.
6 Commercial mobile radio services (“CMRSs”) are new entrants who offer wireless
7 communication and compete with both ILECs and CLECs to provide telephone service.
8 Intervenor-Defendants-Appellees MetroPCS New York, LLC, Sprint Communications, L.P.,
9 Sprint Spectrum, L.P., Nextel Communications of the Mid-Atlantic, Inc., and Youghiogheny
10 Communications Northeast, LLC d/b/a Pocket Communications (“Pocket Communications”) are
11 CMRSs.

12 To advance Congress’ goals of promoting competition and widespread user access to
13 telecommunications services, section 251(a) of Title 47 of the United States Code requires all
14 telecommunications carriers to “interconnect,” that is physically link their facilities for the mutual
15 exchange of traffic. 47 U.S.C. § 251(a); 47 C.F.R. § 51.5. In requiring universal
16 interconnection, the TCA aims to ensure that the customers of all carriers will be able to exchange
17 telecommunications traffic with each other. In addition, §§ 251(c)(2) and 252(d)(1) require
18 ILECs, like AT&T, to physically connect all other carriers to their network facilities at regulated
19 or Total Element Long-Run Incremental Cost (“TELRIC”) rates.¹ 47 U.S.C. §§ 251(c)(2),
20 252(d)(1). In requiring ILECs to provide interconnection to the facilities of new entrants, the

¹ TELRIC rates are based on the cost to the supplier, are determined without reference to a rate-of-return and may include a reasonable profit. 47 U.S.C. § 252(d).

1 TCA seeks to ensure that ILECs do not exploit their former monopoly status and their continuing
2 control of network infrastructure to the disadvantage of CLECs.

3 Interconnection may be direct, where a carrier attaches his equipment to the physical
4 network infrastructure of another carrier, or indirect, where “the attachment occurs through the
5 facilities or equipment of an additional carrier.” *In the Matters of Deployment of Wireline Servs.*
6 *Offering Advanced Telecomms. Capability and Implementation of the Local Competition*
7 *Provisions of the Telecomms. Act of 1996*, 15 F.C.C.R. 17806, 17845 n.198 (2000). Typically,
8 two new entrants use an ILEC’s network to interconnect indirectly. *In the Matter of Dev’g a*
9 *Unified Intercarrier Comp. Regime*, Further Notice of Proposed Rulemaking, 20 F.C.C.R. 4685,
10 4737 (2005) (“Notice 2005”). When carriers are directly interconnected, they are able to
11 exchange traffic. However, when they are indirectly interconnected, they must rely on and pay
12 the interconnecting carrier to route the traffic between them.

13 The principal question in this appeal is whether AT&T, an interconnecting carrier, is
14 obligated under § 251(c)(2) to provide this routing of traffic, or transit service, at lower TELRIC
15 rates or whether AT&T is permitted to charge higher negotiated rates. Most new entrants
16 interconnect indirectly and transit service is essential to ensuring that indirectly interconnected
17 entrants can exchange traffic. It would be inconsistent with the stated purpose of the TCA to
18 allow AT&T to charge higher negotiated rates for this service because this would impose
19 additional costs and competitive disadvantages upon new entrants. Such an imposition would
20 allow AT&T to further exploit its status as a former monopolist. Thus, we conclude that the
21 provision of transit service falls under AT&T’s obligation as an ILEC and that the service must
22 be delivered at regulated rates.

1 **Procedural History**

2
3 *DPUC Decision*

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5 In December 2008, Pocket Communications petitioned the Connecticut Department of
6 Public Utility Control (“DPUC”) to review a commercial agreement it was negotiating with
7 AT&T. The main disagreement in that proceeding (“Pocket Proceeding”) was over the rates that
8 AT&T could charge Pocket for transit service. Pocket alleged that AT&T violated Connecticut
9 statutory law and the DPUC’s 2003 decision in a proceeding under the TCA involving Cox
10 Communication, both of which required AT&T to charge regulated rates for transit service.
11 Pocket Petition, at 12; *see also* Decision, Conn. Dep’t of Pub. Util. Control, *Petition of Cox*
12 *Connecticut Telecom, LLC for Investigation of SNET’s Transit Service Cost Study and Rates*, No.
13 02-01-23 (Jan. 15, 2003) (“Cox Decision”). Pocket argued that the rates AT&T charged for
14 transit service in Connecticut were significantly higher than those it charged in other states and
15 requested that the Commission order them to be lowered. AT&T argued that because transit
16 service did not constitute interconnection under § 251, it was subject to higher negotiated rates.
17 The DPUC concluded that AT&T was required to offer transit service at regulated rates and
18 ordered that those rates be afforded not only to Pocket but to other AT&T transit service
19 customers as well. Decision, Conn. Dep’t of Pub. Util. Control, *Petition of Youghioghney*
20 *Communications Northeast, LLC*, No. 08-12-04, at 42 (Oct. 7, 2009) (“Pocket Decision”).

21 AT&T appealed to the district court on a number of grounds. It first argued preemption:
22 the DPUC was not authorized to regulate transit service because the FCC had occupied the area
23 by examining but not resolving the question. According to AT&T, this inaction was tantamount
24 to a decision not to regulate transit service. AT&T also argued that because transit service did not

1 fit the definition of interconnection under § 251, it was not subject to TELRIC rates. Finally,
2 AT&T argued that under Connecticut law the DPUC was not authorized to regulate
3 telecommunications service rates by issuing declaratory rulings.
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6 *District Court Decision*
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8 The district court affirmed in part and reversed and remanded in part. It held that the
9 DPUC's determination was not preempted by the FCC's comments. Agreeing with the DPUC, it
10 concluded that "interconnection under section 251(c) includes the duties to provide indirect
11 interconnection and to provide transit service" because "[t]he 1996 Act and its attendant
12 regulations should be interpreted so as to promote competition" and it would be difficult for
13 CLECs to compete without transit service which allows them to connect indirectly. *S. N. Eng.*
14 *Tel. Co. v. Perlermino*, No. 3:09-CV-1787 (WWE), 2001 WL 1750224, at *12 (D. Conn. May 6,
15 2011). Therefore, the district court affirmed the DPUC's ruling ordering AT&T to provide transit
16 service to Pocket Communications at regulated rates. However, the district court also held that
17 the DPUC's order requiring AT&T to extend regulated pricing to CLECs who were not parties to
18 the proceeding was impermissible because that approach would short-circuit voluntary
19 negotiation, the preferred rate-setting method under the TCA. This appeal followed. We review
20 *de novo* a district court's decision as to whether a state commission's order complies with federal
21 law. *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 454 F.3d 91, 96 (2d Cir. 2006). For the
22 reasons that follow, we affirm the district court.
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1 **DISCUSSION**

2
3 **I.**
4

5 The ultimate question for us is whether AT&T is obligated to provide transit service
6 pursuant to the interconnection obligations of § 251. This requires us to decide whether the
7 obligation arises under § 251(a), which addresses the general duties of all telecommunications
8 carriers, or under § 251(c), which addresses the duties of former monopolists. This distinction is
9 significant because the interconnection obligations under § 251(a) are subject to higher negotiated
10 rates, while those under § 251(c) are to be fulfilled at significantly lower, regulated rates.

11 But first, we must decide two threshold issues: (1) whether a state commission is
12 preempted from determining that transit service is among the obligations imposed on carriers by
13 § 251 when the FCC has considered, but not yet made, this determination, and (2) whether a state
14 commission may interpret the TCA in proceedings other than those specified in § 252. AT&T
15 also contends separately that, under Connecticut law, the DPUC was not authorized to resolve
16 this dispute in a proceeding seeking a declaratory ruling.

17 The FCC's comments and inaction relating to transit service do not preempt the DPUC
18 here. "The model under the TCA is to divide authority among the FCC and the state commissions
19 in an unusual regime of 'cooperative federalism,' with the intended effect of leaving state
20 commissions free, where warranted, to reflect the policy choices made by their states." *Global*
21 *Naps, Inc.*, 427 F.3d at 46 (internal citation omitted). While "under cooperative federalism,
22 federal and state agencies should endeavor to harmonize their efforts with one another" and "state
23 commissions are directed by provisions of the Act and FCC regulations in making decisions," the

1 TCA “gives the state commissions latitude to exercise their expertise in telecommunications and
2 needs of the local market.” *Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*,
3 323 F.3d 348, 352 (6th Cir. 2003) (quoting Philip J. Weiser, *Federal Common Law, Cooperative*
4 *Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1724 (2001)).

5 Accordingly, Congress included a savings clause in the TCA to protect state
6 experimentation with interconnection obligations. In that regard, “Congress expressly left with
7 the states the power to enforce ‘any regulation, order, or policy of a State commission that . . .
8 establishes access and interconnection obligations of local exchange carriers; . . . is consistent
9 with the requirements of this section; and . . . does not substantially prevent implementation of the
10 requirements of this section and the purposes of this part.’” *Global Naps, Inc.*, 427 F.3d at 46
11 (quoting 47 U.S.C. § 251(d)(3)(A)-(C)). The TCA, then, permits state commissions to regulate
12 interconnection obligations so long as they do “not violate federal law and until the FCC rules
13 otherwise.” *See Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006).

14 Although the FCC has been considering the regulation of transit services for a number of
15 years, it has not yet adopted a final position.² In its most recent pronouncement, the FCC
16 recognized that while it has yet to determine whether to regulate transit service, a number of state
17 commissions and courts have done so.³ *In the Matter of Connect Am. Fund*,

² *See In the Matter of Connect Am. Fund et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 F.C.C.R. 4554, 4776 (2011) (“Notice 2011”); *In re Connect Am. Fund, A Nat’l Broadband Plan for Our Future et al.*, Report and Order and Further Notice of Proposed Rule-Making, 26 F.C.C.R. 17663, 18114 (2011); *In re High-Cost Universal Serv. Support*, 24 F.C.C.R. 6475, 6650 (2008); Notice 2005, 20 F.C.C.R. 4685, 4737.

³ At least sixteen state commissions in addition to the DPUC have exercised their regulatory authority under the Act to determine that ILECs must provide transit traffic service at regulated rates. *See Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecomm., Inc. and Intermedia Commc’ns., Inc.*, Ala. Pub. Serv. Comm’n, No. 99-00948, Order, at 122 (July 11, 2000); *In the Matter of Telcove Investment, LLC’s Petition for Arbitration*, Ark. Pub. Serv. Comm’n, No. 04-167-U, Order No. 10, at 37 (Sept. 15, 2005);

1 *A Nat'l Broadband Plan for Our Future et al.*, Report and Order and Further Notice of Proposed
 2 Rule-Making, 26 F.C.C.R. 17663, 18114 (2011) (“ Report and Order 2011”). In light of these
 3 factors, we have little difficulty concluding that with regard to transit service Congress did not
 4 intend to preempt state regulation, the text of the TCA does not support preemption, and the
 5 FCC’s indecision simply reflects its current preference for continued experimentation by state
 6 commissions.

7 We next consider whether the DPUC exceeded its authority when it resolved the dispute
 8 between the parties, which arose under a commercial agreement and not an interconnection
 9 agreement (“ICA”). AT&T contends that when it reviewed the commercial agreement between

Petition of Level 3 Commc'ns, LLC (U-5941-C) for Arbitration, Cal. Pub. Utils. Comm'n, Final Arbitrator's Report, No. 04-06-004, at 42 (Feb. 8, 2005); *Application by Pacific Bell Telephone Company d/b/a SBC California (U 1001 C) for Arbitration*, Cal. Pub. Utils. Comm'n, No. 05-05-027, Decision 06-08-029, at 9 (Aug. 24, 2006); *Joint Petition by TDS Telecom d/b/a TDS Telecom/Quincy Telephone, Order on BellSouth Telecoms., Inc.'s Transit Traffic Service Tariff*, Fla. Pub. Serv. Comm'n, Order No. PSC-06-0776-FOF-TP, Nos. 05-119-TP and 05-0125-TP, at 17 (Sept. 18, 2006); *Level 3 Commc'ns., L.L.C Petition for Arbitration*, Ill. Commerce Comm'n, No. 04-0428, Admin. Law Judge's Proposed Arbitration Decision (Dec. 23, 2004); *In the Matter of Level 3 Commc'ns, LLC's Petition for Arbitration*, Ind. Utils. Reg. Comm'n, No. 42663 INT-01, at 12 (Dec. 22, 2004); *In the Matter of Arbitration Between Level 3 Commc'ns, LLC and SBC Commc'ns, Inc.*, Kan. Corp. Comm'n, No. 04-L3CT-1046-ARB, at 283 (Feb. 2, 2005); *Joint Petition for Arbitration of NewSouth Commc'ns Corp., NUVOX Commc'ns, Inc. KMC Telecom V. Inc., KMC Telecom III LLC, and Xspedius Commc'ns, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecoms., Inc.*, Ky. Pub. Serv. Comm'n, No. 2004-00044, at 22 (Sept. 26, 2005); *Petitions of MediaOne Telecommunications of Massachusetts, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for arbitration*, Mass. Dep't of Telecomm. and Energy, Nos. 99-42/43, 99-52, at 122 (Aug. 25, 1999); *In the Matter of the Petition of Michigan Bell Telephone Company, d/b/a SBC Michigan, for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with MCIMetro Access Transmission Services, LLC*, Mich. Pub. Serv. Comm'n, No. U-13758, at 46 (Aug. 18, 2003); *Application of Chariton Valley Comms. Corp., Inc., for Approval of an Interconnection Agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri*, Mo. Pub. Serv. Comm'n, Order Rejecting Interconnection Agreement, No. TK-2005-0300 (May 29, 2005); *Petition of Socket Telecom LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Mo., LLC and Spectra Comms., LLC*, Mo. Pub. Serv. Comm'n, No. TO-2006-0299, at 47 (June 27, 2006); *In the Matter of the Application of Cox Nebraska Telecom, LLC, Omaha*, Neb. Pub. Serv. Comm'n, No. C-3796, Order Approving Agreement, at 3 (Jan. 29, 2008); *In the Matter of Joint Petition of NewSouth Comms. Corp. for Arbitration with BellSouth Telecommunications, Inc.*, N.C. Utils. Comm'n, No. P-772, Sub 8, P-913, Sub 5, P-989, Sub 3, P-824, Sub 6, P-1202, at 131 (July 26, 2005); *In the Matter of the Establishment of Carrier-to-Carrier Rules*, Pub. Utils. Comm'n of Ohio, No. 06-1344-TP-ORD, at 92-93 (Aug. 22, 2007).

1 AT&T and Pocket Communications, the DPUC exceeded its limited role under § 252, which
2 permits it only to mediate, arbitrate or approve ICAs. Rep. Br. at 3. The DPUC contended below
3 that it is aware that it has no power to review commercial agreements, but that it was authorized
4 to reach its decision because transit service must be regulated under § 251 and, therefore, must be
5 negotiated in an ICA. Brief of Appellee at 16, *S. New Eng. Tel. Co. v. Palermino*, No. 09-cv-
6 1787 (D. Conn Feb. 5, 2010), ECF No. 53.

7 The enforcement role of state commissions in matters arising under § 251 is set out
8 primarily in § 252 which authorizes state commissions to mediate, arbitrate and approve ICAs.
9 *See* 47 U.S.C. § 252(a)-(e). The TCA contemplates that when a new entrant requests
10 interconnection from an ILEC, the two parties will undertake to reach an agreement through
11 voluntary negotiation. *See* 47 U.S.C. § 252(a)(1). The resulting voluntarily-negotiated ICAs are
12 not subject to the detailed, specific interconnection obligations of § 251(c). *See id.* If negotiations
13 fail, the parties can petition their state commission to either mediate or arbitrate the open issues in
14 their ICAs. *See* 47 U.S.C. 252(a)(2)-(b); *AT&T Corp.*, 525 U.S. at 371-73. Where a commission
15 undertakes to arbitrate open issues, it must ensure that the resolution of these issues complies with
16 § 251(c) and that former monopolies charge TELRIC rates when they provide interconnection.
17 47 U.S.C. § 252(c).

18 All ICAs, whether negotiated by the parties or mediated or arbitrated, must be approved
19 by a state commission. *See* 47 U.S.C. § 252(e)(1). Negotiated agreements and arbitrated
20 agreements are subject to different approval criteria. The former may be rejected only if they
21 discriminate against carriers not party to the agreement or are inconsistent with “public interest,
22 convenience and necessity.” 47 U.S.C. § 252(e)(2)(A). The latter may be rejected if they do not

1 meet the interconnection and other requirements of § 251(c) or pricing standards under § 252(d).
2 47 U.S.C. § 252(e)(2)(B). When approving negotiated or arbitrated ICAs, a commission may
3 review the agreement for compliance with state law. *See* 47 U.S.C. § 252(e)(3) (“nothing in this
4 section shall prohibit a State commission from establishing or enforcing other requirements of
5 State law in its review of an agreement, including requiring compliance with intrastate
6 telecommunications service quality standards or requirements”).

7 Moreover, where parties seek clarification as to whether a contractual agreement is subject
8 to § 252(a)(1), the FCC has ruled that “[b]ased on their statutory role provided by Congress and
9 their experience to date, state commissions are well positioned to decide on a case-by-case basis
10 whether a particular [negotiated] agreement is required to be filed as an ‘interconnection
11 agreement’ and, if so, whether it should be approved or rejected.” *In the Matter of Qwest
12 Comm’ns Int’l Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain
13 Prior Approval of Negotiated Contractual Arrangement under Section 252(a)(1)*, Memorandum
14 Opinion and Order, 17 F.C.C.R. 19337, 19341 (2002). Therefore, state commissions “should
15 determine in the first instance which sorts of agreements shall fall within the scope of the
16 statutory standard” under § 252. *Id.* at 19342.

17 In this case, the DPUC made such a determination. It reviewed the commercial agreement
18 between AT&T and Pocket Communications and concluded that “negotiations for [transit
19 service] should have been conducted with [the carriers] pursuant to 47 U.S.C. [§] 252,” resulting
20 in an interconnection agreement subject to DPUC approval. Pocket Decision, at 36. This is
21 consistent with the FCC’s view that state commissions are authorized to determine whether
22 negotiated agreements must be filed as ICAs under § 252. However, as the DPUC acknowledges,

1 state commissions do not have the authority to order changes in commercial agreements affecting
2 services that are not subject to § 252. *Id.* at 41. Additionally, the DPUC’s review of the Pocket
3 agreement here was authorized by its previous ruling, in the Cox Proceeding, that transit service
4 should be regulated under § 251.

5
6 **II.**
7

8 Next, AT&T contends that the DPUC failed to follow state law and consequently
9 exceeded its authority when it issued binding orders under Conn. Gen. Stat. § 4-176, which
10 provides that

11 [a]ny person may petition an agency, or an agency may on its own motion
12 initiate a proceeding, for a declaratory ruling as to the validity of any regulation,
13 or the applicability to specified circumstances of a provision of the general
14 statutes, a regulation, or a final decision on a matter within the jurisdiction of the
15 agency.

16
17 Conn Gen. Stat. § 4-176(a). The DPUC contends that § 4-176(a) authorizes the result reached in
18 the case. AT&T argues that an action under § 4-176(a) allows the DPUC only to issue non-
19 binding advisory opinions and that the DPUC exceeded its authority under that statute because it
20 issued binding generic orders in a declaratory proceeding.

21 The district court did not comment on this pendant state law claim, and AT&T failed to
22 argue that the district court abused its discretion when it declined this exercise of supplemental
23 jurisdiction. Because “principles of federalism and comity” instruct us to leave unresolved
24 questions of state law to the states “where those questions concern the state’s interest in the
25 administration of its government,” we do not think that the district court abused its discretion by
26 passing on this issue. *Valencia v. Lee*, 316 F.3d 299, 306 (2d Cir. 2003) (internal quotation marks
27 and citation omitted); *see also* 28 U.S.C. § 1367(c). Likewise, we will not consider it here in the
28 first instance or remand for the district court to reconsider.

1 We note that Neutral Tandem LLC, a CLEC transit service provider that contributed an
2 amicus brief in this action, is currently litigating this issue in state court. *See* Complaint, Neutral
3 Tandem-N.Y., LLC v. Dep't of Pub. Util. Control, No. CV-09-6002233-S (Conn. Super. Ct. Nov.
4 18, 2009). That action is stayed pending the resolution of this appeal. *See* Report of the Parties,
5 Neutral Tandem-N.Y., LLC v. Dep't of Pub. Util. Control, No. CV-09-6002233-S (Conn. Super.
6 Ct. June 15, 2012). We believe that this question, arising under Connecticut law, is appropriately
7 considered in the first instance by its courts.

8 III.

9 We next consider whether AT&T is obligated under the TCA to provide transit service at
10 either TELRIC or negotiated rates. The dispositive question is whether transit service falls under
11 the ILECs' interconnection obligations set out in § 251(c)(2). As noted above, all
12 telecommunications carriers must interconnect either directly or indirectly, and ILECs must
13 provide direct interconnection to other carriers at regulated rates. *See* 47 U.S.C. §§ 251(a)(1),
14 252(d)(1)(A)(i).

15 Transiting occurs when two carriers that are directly interconnected with a third
16 "intermediary" carrier, but not with each other, "exchange non-access traffic by routing the traffic
17 through [the] intermediary carrier's network." Notice 2011, 26 F.C.C.R. 4554, 4776. Typically,
18 the intermediary carrier is an ILEC and the transited traffic is routed from one CLEC through the
19 ILEC's facilities to the other CLEC. Notice 2005, 20 F.C.C.R. 4685, 4737. "The intermediary . .
20 . carrier then charges a fee for use of its facilities." *Id.* While, as we have noted, the FCC has not
21 yet determined whether to regulate transit service under § 251, reflecting on the importance of
22 transit service, the Commission has found that
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2 the availability of transit service is increasingly critical to establishing indirect
3 interconnection—a form of interconnection explicitly recognized and supported
4 by the Act. It is evident that [CLECs] . . . often rely upon transit service from
5 the [ILECs] to facilitate indirect interconnection with each other. Without the
6 continued availability of transit service, carriers that are indirectly
7 interconnected may have no efficient means by which to route traffic between
8 their respective networks.

9
10 *Id.* at 4740 (footnote omitted).

11 The FCC has defined indirect interconnection as occurring when “two non-incumbent
12 LECs interconnect[] with an incumbent LEC’s network.” *In the Matter of Implementation of the*
13 *Local Competition Provisions in the Telecomms Act of 1996*, 11 F.C.C.R. 15499, 15991 (1996).

14 The FCC has also stated that CLECs may satisfy their duties to interconnect pursuant to §
15 251(a)(1) through indirect interconnection. *Id.* (“Given the lack of market power by
16 telecommunication carriers required to provide interconnection via section 251(a), and the clear
17 language of the statute, we find that indirect connection . . . satisfies a telecommunications
18 carrier’s duty to interconnect pursuant to section 251(a).”). Consequently, two CLECs satisfy
19 their interconnection obligations under § 251(a) when they are both physically linked with one
20 ILEC. Given the dominance of ILECs over physical infrastructure, most CLECs may
21 interconnect with each other only indirectly. Notice 2005, 20 F.C.C.R. 4685, 4737.

22 Without transit service, two CLECs will be connected physically to AT&T, but will not be
23 able to exchange traffic. They sustain an additional cost, one not imposed on ILECs, to facilitate
24 “the mutual exchange of traffic” as required in the definition of interconnection. *See* 47 C.F.R. §
25 51.5. Such additional cost, and resulting competitive disadvantage, would be inconsistent with
26 the TCA’s stated objective, which is “to provide for a pro-competitive, de-regulatory national
27 policy framework designed to accelerate rapidly private sector deployment of advanced

1 telecommunication and information technologies and services to all Americans by opening all
2 telecommunications markets to competition” H.R. Rep. No. 104-458, at 1 (1996) (Conf.
3 Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124. “In determining the legislative intent, our duty is to
4 favor an interpretation which would render the statutory design effective in terms of the policies
5 behind its enactment and to avoid an interpretation which would make such policies more
6 difficult of fulfillment” *Nat’l Petroleum Refiners Ass’n. v. FTC*, 482 F.2d 672, 689 (D.C.
7 Cir. 1973) (internal citation omitted). “In the absence of an unmistakable directive, we cannot
8 construe the Act in a manner which runs counter to the broad goals which Congress intended it to
9 effectuate.” *Id.* (internal quotation marks, citation and alteration omitted). Consequently, we find
10 that transit service is an ILEC obligation under § 251(c) because it ensures that indirect
11 interconnection facilitates the mutual exchange of traffic between new entrants in the market.

12 AT&T argues that even if it can be construed as essential to indirect interconnection,
13 transit service obligations can only fall under § 251(a), which addresses indirect interconnection,
14 and that consequently CLECs must bear the full cost of the service. Appellant’s Br. at 29. We
15 disagree. Section 251(a) merely requires that all ILECs interconnect, and CLECs may do so
16 indirectly. However, under § 251(c) an ILEC *must* provide interconnection for a CLEC’s
17 facilities and equipment “for the transmission and routing of telephone exchange service and
18 exchange access.” 47 U.S.C. § 251(c)(2)(A). Therefore, an ILEC must provide transit service
19 when a CLEC interconnects with a third carrier. Without transit service, the indirect
20 interconnection between two CLECs could not be used “for the transmission and routing of
21 telephone exchange service and exchange access.” *Id.* An ILEC could frustrate the flow of
22 traffic and prevent carriers from indirectly interconnecting, rendering the language in § 251(a),
23 which mandates indirect interconnection, meaningless.

1 AT&T further points to the FCC's definition of interconnection as the "linking of two
2 networks for mutual exchange of traffic" in arguing that interconnection for the mutual exchange
3 of traffic can only refer to the exchange of traffic between the carrier whose customer originates
4 the call and the second carrier that terminates the call to one of its customers. Appellant's Br. at
5 27-28. Consequently, AT&T argues, because transit service does not involve AT&T end-users,
6 we must conclude that it cannot constitute an interconnection obligation under § 251.

7 However, nothing in the language of § 251 suggests that the interconnection duty relates
8 only to the transmission and routing of traffic between a CLEC and the ILEC's end-users. The
9 FCC has ruled that carriers have the right to interconnect to exchange traffic that does not
10 originate or terminate on their own networks. *See In the Matter of Time Warner Cable Request*
11 *for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection*
12 *Under Section 251 of the Commc'ns Act of 1934, as Amended, to Provide Wholesale Telecomms.*
13 *Servs. to VoIP Providers*, Memorandum, Opinion and Order, 22 F.C.C.R. 3513 (2007). The FCC
14 has also found that interconnection obligations under § 251 apply in favor of paging carriers who
15 do not originate traffic. *TSR Wireless, LLC v. U.S. W. Commc'ns, Inc.*, Memorandum Opinion
16 and Order, 15 F.C.C.R. 11166 (2000). Therefore, the obligations associated with interconnection
17 are not limited to situations where AT&T terminates the traffic.

18 19 IV.

20
21 Finally, we conclude that the district court correctly determined that the DPUC's
22 imposition of regulated rates on all of AT&T's transit traffic service contracts is not permitted.

1 The district court found this order to be arbitrary and capricious because it short-circuited
2 voluntary negotiation under § 252(a). Congress' preference for negotiated resolutions, reflected
3 in § 252, is clear. We join several other circuits in concluding that attempts by state utility
4 commissions to set cost-based pricing for all carriers in proceedings to which they are not parties
5 is incompatible with the negotiated agreement provision of § 252(a). *See Verizon New. Eng., Inc.*
6 *v. Me. Pub. Utils. Comm'n*, 509 F.3d 1, 9 (1st Cir. 2007); *Wis. Bell, Inc. v. Bie*, 340 F.3d 441, 445
7 (7th Cir. 2003); *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003);
8 *Verizon N., Inc. v. Strand*, 309 F.3d 935, 939-44 (6th Cir. 2002).

9
10 **CONCLUSION**

11
12 The judgment of the district court is **affirmed**.